IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 06.03.2002

Coram

THE HONOURABLE MR. JUSTICE P. SHANMUGAM

and

THE HONOURABLE MR. JUSTICE P. THANGAVEL

WRIT APPEAL No.1909 of 2000 and C.M.P. No.16508 of 2000

THE MANAGEMENT OF D.A.T.C. LTD.,
NOW RENAMED AS
METROPOLITAN TRANSPORT CORPORATION
(CHENNAI-DIV.II) LTD.,
23, ANDERSON STREET
MADRAS-23. .. APPELLANT
Vs.

1. THE PRESIDING OFFICER,
I ADDL LABOUR COURT,
MADRAS.

2. V.SRINIVASAN .. RESPONDENTS

PRAYER : Writ Appeal against the order of the High Court dated 22.9.2000 passed in Writ Petition No.17584 of 1997.

: ORDER

The Writ Appeal coming on for hearing on this day, upon perusing the Grounds of appeal, the order of the learned single Judge of the High Court made in the writ petition in exercise of the Special Original Jurisdiction of the High Court in and all other papers material to this case and upon hearing the arguments of

! Mr. P. Ranganatha Reddy for M/s. King & Partridge for the Appellant,

^ and of Mr. V. Srinivasan, second respondent (Party-inPerson)

and having stood over for consideration till this day, the Court passed the following Judgment :-

J U D G M E N T

P. SHANMUGAM, J.

The Metropolitan Transport Corporation (hereinafter referred to as the Corporation) is the appellant herein. An Award in I.D. No.388 of 1995 was passed by the First Additional Labour Court, Madras holding that the removal of the second respondent herein from the services of the Corporation on 12.9.1994 is improper and that he is entitled for being appointed as Helper or Store Keeper with effect from 12.9.1994 . A learned single Judge of the High Court has confirmed the Award and dismissed the writ petition. The appeal is against this order.

2. The brief facts of the case are stated hereunder :
The second respondent herein was employed as a driver with the Corporation. While he was on duty on 5.11.1993, he suffered certain injuries and consequently, he lost his hearing ability. On the basis of the medical report finding that there is a total sensory neural hearing loss in the left hear and sensory neural loss in the right ear and that he is not suitable for continuance in the post of driver, he was advised to take up suitable ground job. On the basis of this report, the second respondent was discharged from his service on medical grounds on 1.7.1994. The second respondent raised a dispute and it is the specific case of the Corporation before the Conciliation Officer that they are prepared to appoint the second respondent in terms of Clause 82 of the Settlement under Section 12(3) of the Industrial Disputes Act, 1947. Since the second respondent refused to take the offer, a failure report was submitted and a reference was ordered. The First Additional Labour Court directed the Corporation to provide employment to the second respodnent as Helper or Store Keeper on the basis of his educational qualification with effect from 12.9.1994. The Corporation filed Writ Petition No.17584 of 1997 and the learned single Judge of this Court confirmed the order of the Labour Court. The appeal is against these orders.

3. The main submissions of the learned counsel for the appellant are as follows :
(i) The Labour Court has no jurisdiction to order reinstatement inasmuch as this is not a case of illegal termination or retrenchment and that discharging the employee on medical ground is not ' retrenchment' as defined under Section 2(oo) readwith 25(f) of the Industrial Disputes Act.
(ii) The Corporation was always ready and willing to provide alternative employment to the second respondent as fresh entrant in terms of their Standing Order and the second respondent did not report for duty inspite of repeated directions.
(iii) The Government Order in G.O. Ms. No.746 dated 2.7.1981 which is applicable to state transport undertakings was failed to be taken note of both by the Labour Court and by the learned single Judge in the writ petition.
(iv) The Government Order in G.O. Ms. No.86 dated 8.2.1996 has no application to the facts of the case and there is no discrimination in this case, since the Corporation is an independent entity and cannot be compared to a department of the State Government.
(v) The second respondent is bound by the terms of the

Settlement.

4. The second respondent who appeared as party-in-person, while reiterating the findings of the Labour Court and the learned single Judge in his favour, submits that he is entitled for re-employment with continuity of service and backwages. According to him, he could not join duty only because of the failure of the Management in not providing him the job with continuity of service and arrears of pay.

5. We have heard the counsel and the party-in-person and considered the matter carefully.

6. The fact that the second respondent, while in service as driver of the Corporation, suffered certain injuries and that thereafter, on the basis of the medical report, he was found to be medically not fit to continue in the said post is not in dispute. The main question that arises for consideration in this appeal is whether the second respondent is entitled to be retained in an alternative employment with continuity of service.

7. The Memorandum of Settlement made under Section 12(3) of the Industrial Disputes Act, 1947 dated 29.9.1995, inter alia, provides for the employment on discharge, on medical grounds. Clause 82 of the Terms of the Settlement says that in case an employee is liable to be removed from service on medical grounds, he may be provided with an alternative employment. However, he will be appointed afresh with the lowest scale of pay applicable to be category in which he was working previously. Under Clause 83, if an employee has to be removed because of illness, he will be appointed afresh in the lowest scale of pay applicable for the category in which he is appointed. A distinction has been made between persons who are liable to be removed consequent on accident of injury suffered during duty and personnel in reference to removal consequent on their ill health.

8. The Government Order in G.O. Ms. No.746 dated 2.7.1981 is made in reference to all the State Transport undertakings employees invalidated on medical grounds. As per this Government Order, if the workers are declared unfit while in service, they will be provided with an alternative employment in posts like Helpers, afresh, depending upon their qualification, after settling their service benefits and upon their qualification and experience and their suitability to the new post, without consulting the employment exchange. The order says "They should be appointed as fresh entrants only in the scale of pay or consolidated pay applicable to the new post." Section 2(oo) of the Industrial Disputes Act 1947, which defines retrenchment, says as to mean the termination of the services of a workman otherwise than as a punishment, but does not include termination of the service of the workman on the ground of continued ill health. In the light of these clear provisions, as rightly pointed out, the Labour Court cannot treat this as termination of service.

9. In his petition under Clause 2-A(2) of the Industrial Disputes Act in paragraph 8, the second respondent has stated that in the 2-A petition filed before the Labour Officer-II, the Corporation had filed their counter statement stating that as per the existing G.O. Ms. No.746, Transport Department dated 2.7.1981, employees in state transport undertakings who are declared unfit for continuance in the said post by doctors while in service, should be discharged from service and appointed as fresh entrants based on their educational qualifications and experience. The second respondent proceeded as though there was a total denial of employment and that the Management had acted contrary to Section 25(f) of the Act. The learned single Judge, while confirming the order, held that G.O. Ms. No.86 dated 8.2.1996, which is applicable to public service should also be made applicable to the Corporation and that there cannot be a difference in treatment between the drivers of the Corporation and those of the Government.

10. It is submitted that there are about 30,000 employees in the 20 and odd Government owned Transport Corporations and that in the course of service, there are a number of cases of discharge on medical grounds and that it will not be practically possible for the Corporation to provide re-employment to all those employees with continuity of service. The injured employees are given compensation under the Workmen's Compensation Act. In this case, the second respondent was paid a sum of Rs.80,611/- being the compensation for the injury sustained by him on 5.11.1993 and he was offered an alternative employment in terms of G.O. Ms. No.746 dated 2.7.1981. The said Government Order is specifically intended to be made applicable to the employees of the State transport undertakings invalidated on medical grounds.

11. The Government Order in G.O. Ms. No.86 dated 8.2.1996 which was very much relied upon, directed that if any driver is declared unfit for continuance in the same post by doctors because of eye defect or any other ailment, he should be provided wi lternative employment in posts like Helpers or Office Assistants, depending upon their qualifications by retaining the same pay scale. In this Government Order, while referring to G.O. Ms. No.746, crucial words are omitted to be referred to and considered. They are, "they should be appointed as fresh entrants only in the scale of pay or consolidated pay admissible to the new post and their services terminated on their attaining the age of superannuation". While the Government Order deals with the case of regular medical fitness test, if the drivers are found unfit, then they were directed to be provided with alternative employment. The situations contemplated under these two orders are different. In any event, employees of State transport undertakings constitute a separate class by themselves and they cannot be equated to the drivers in public service departments. The number of drivers in Government service, the nature of their duties and the availability of alternative jobs in that service are entirely different from the number of drivers in the State transport undertakings and the nature of their duties and the availability of other alternative service. Both are not comparable because of the fact that drivers of Corporation are doing the work of driving heavy vehicles,

whereas in case of drivers in public service, they are drivers of light vehicles. The method of recruitment, technical qualification, training, degree of skill and the physical requirement are different. The paying capacity of the Management and the Government are different. Their functions and responsibilities are qualitatively different. While G.O. Ms. No.746 dated 2.7 .1981 specifically speaks of employees in State transport undertakings and is intended to apply for them, it is not possible for this court to ignore the said Government Order. The said order is not under challenge before this court.

12. Further, it is seen that the Labour Court proceeded on the basis that the second respondent has been terminated without following Section 25(f) of the Act. We find much force in the submission of the counsel for the appellant that discharging employeed on medical ground is not retrenchment and that Section 25(f) of the Act has no application to this case.

13. In ANAND BIHARI & OTHERS VS. RAJASTHAN STATE ROAD TRANSPORT CORPORATION, JAIPUR & ANOTHER (1991 LAB.I.C. 494), the Supreme Court held that where a workman is discharged on the ground of ill health, it is because he was unfit to discharge the service which he had undertaken to render and therefore, it had really come to an end on itself. It would follow that such a person cannot be said to have been retrenched within the meaning of the Act. In the same judgment, the Supreme Court evolved a scheme to give relief to such workmen. As per clause 1 of that scheme, the Corporation shall, in addition to giving each of the retired workmen his retirement benefits, offer him any other alternative job which may be available and which he is eligible to perform. By referring to the judgment in RAMESHWAR DASS & OTHERS VS. STATE OF HARYANA & OTHERS [1995 (II) L.L.J. 716 (S.C.)], their lordships held that the question of payment of additional compensation will arise only when it is not possible to provide alternative job to them.

14. It is the specific case of the Corporation even in their counter to the claim petition that an alternative job was suggested for the second respondent as a new entrant to the post for which he is eligible, according to his qualifications. The second respondent himself has conceded the said offer in his claim petition. In the counter filed in opposition to the writ petition, it is stated that the Management took a decision to challenge the award insofar as backwages alone. The second respondent was absorbed as Helper as a fresh entrant from 12.9.1994 and posted to work at Vyasarpadi Depot by Memorandum dated 22.9.1997 without prejudice to the rights of the Management to file writ petition. Though the second respondent received the Memorandum on 24.9.1997, he failed to report for duty and insisted for continuance of service and protection of pay in terms of the award. The second respondent was again directed to report for duty vide Memorandums dated 31.10.1997, 20.12.1997 and 26.2.1998. However, he failed to report for duty. Therefore, from the communication of the Management and the earlier stand, it is clear that they were prepared to provide the second respondent an alternative employment afresh in a post suitable to him. However, the second

respondent was not prepared to take the appointment.

15. In the light of the above discussion, we hold that the award of the Labour Court, as confirmed by the order of this Court, is not sustainable. There is no non-employment or termination of services of the second respondent, and the second respondent was rightly discharged on medical ground. The writ appeal is accordingly allowed. The second respondent is entitled to report for duty in compliance with the directions of the appellant Corporation dated 31.10.1997 and he is entitled to be appointed as per G.O. Ms. No.746 dated 2.7.1981 readwith Clause 82 of the Settlement under Section 12(3) of the Industrial Disputes Act, 1947 and paid salary accordingly. However, there will be no order as to costs. Consequently, the connected C.M.P. is closed.

Index : Yes (P.S.M.J.) (P.T.J.)
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Internet : Yes

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To

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2. THE PRESIDING OFFICER,
I ADDITIONAL LABOUR COURT,
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3. V.SRINIVASAN,
56, CHINNATHAMBI NAICKEN STREET,
VYASARPADI,
MADRAS-39.

P. SHANMUGAM, J.
and
P. THANGAVEL, J.

Pre-delivery Judgment in
W.A. No.1909 of 2000
and connected CMP.
Delivered on 06-03-2002.